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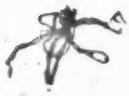

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 53

THE UNITED STATES OF AMERICA, APPELLANT

v.

MARIE KENNY, ALIAS MARIE RICKERT, ALIAS MAE KELLY

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

BRIEF FOR THE UNITED STATES

OPINION BELOW

The memorandum opinion of the District Court (R. 7) is not reported.

JURISDICTION

The order of the court below quashing the indictment was entered February 20, 1940 (R. 7–8). The Government applied for (R. 8) and was allowed an appeal on March 20, 1940 (R. 9). Probable jurisdiction was noted by this Court May 6, 1940. The jurisdiction of this Court is conferred by the Act of March 2, 1907, c. 2564, 34 Stat. 1246, as amended (U. S. C., Title 18, Sec. 682), otherwise known as the Criminal Appeals Act, and

by Section 238 of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936 (U. S. C., Title 28, Sec. 345).

QUESTION PRESENTED

Whether an indictment alleging that a witness before a grand jury willfully testified falsely that she did not make certain statements to Government agents charges the offense of perjury under Section 125 of the Criminal Code.

STATUTE INVOLVED

Criminal Code, Section 125 (U. S. C., Title 18, Sec. 231):

> Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, shall willfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than two thousand dollars and imprisoned not more than five years.

STATEMENT

The appellee, hereinafter called the defendant, was indicted on October 11, 1939, in the United States District Court for the District of New Jersey for the crime of perjury under Section 125 of the

Criminal Code (R. 1–5). The indictment, which was in one count, charged in substance that on August 8, 1939, the defendant was duly sworn as a witness before a lawfully constituted grand jury investigating violations of the income tax laws; that certain of her testimony set forth in the indictment (R. 4–5) to the effect that she did not make various statements to Government agents[1] was false in that,

[1] The following questions and answers were set forth in the indictment (R. 4–5):

"Q. Well, don't you recall at that time that you told me that you had gone to Ray Born for permission to open a house?

"A. I did not. I didn't mention—because, after all, I do know law. I told you I had been indicted.

"Q. You never told me?

"A. No; I didn't. That's the reason I said, 'If you want to ask me anything or to sign that paper, you should send it to my attorney,' and if he said I should do it, naturally I would do it, because I had only become indicted.

* * * * * * *

"Q. Mrs. Kenny, do you mean to tell this Grand Jury that when Special Agent Frank was questioning you, you didn't tell him that you asked Ray Born for permission to open?

"A. I did not.

"Q. Didn't he ask you whether or not you had any expenses for protection, and didn't you tell him about the $50 and $100, and also say that you started the house after speaking to Ray Born?

"A. No; I didn't. I said I put it in an envelope, told him what it was, told him that I put $50 like in the winter and $100 in the summer, and then he asked me something about other donations, like for charity, and I tried to the best of my ability to tell him the amount, which was something I really couldn't exactly tell, because sometimes there was a lot and sometimes a little, but I never answered that question at that time to Mr. what's-his-name, because after all, I did know my statue at that time."

as she well know, she did state to two agents that she had gone to Ray Born for permission to open a house of prostitution in Atlantic City and that she operated such a house after speaking to Ray Born in 1935 (R. 5). The indictment further alleged that whether the defendant made these statements to the Government agents was a matter material to the inquiry conducted by the grand jury, the other matters alleged to be material being whether the proprietors of houses of prostitution in Atlantic City obtained permission to conduct their business without official molestation, what payments were made for such permission, and to whom they were made, whether they were made to certain individuals, and whether Raymond R. Born, Undersheriff of Atlantic County, New Jersey, received for such permission income which he failed to report (R. 3–4).

The defendant moved to quash the indictment on the ground that it did not charge an offense against the United States. In a memorandum opinion (R. 7) filed February 14, 1940, the District Court held that the indictment did not charge an offense under Section 125 of the Criminal Code, stating that "The same conditions exist" as in *United States* v. *May Harris, alias Kitty Harris* (No. 52, October Term, 1940), and referring to the reasons set forth in its opinion in the companion case. On February 20, 1940, the District Court entered an order quashing the indictment (R. 7–8).

SPECIFICATION OF ERRORS TO BE URGED

The District Court erred:

1. In holding that a false denial under oath by a witness before a grand jury that she had theretofore made certain statements to Government agents did not constitute a violation of Section 125 of the Criminal Code, even though the fact that she had made the statements was material to the grand jury inquiry;

2. In holding that the indictment did not charge an offense under Section 125 of the Criminal Code;

3. In quashing the indictment.

ARGUMENT

The question involved in this case is identical with that presented in *United States* v. *Harris*, No. 52, October Term, 1940. Reference is therefore made to our brief in the *Harris* case for the argument in support of the Government's position.

CONCLUSION

It is respectfully submitted that the order of the District Court should be reversed.

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OCTOBER 1940.

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SUPREME COURT OF THE UNITED STATES.

Nos. 52, 53.—October Term, 1940.

52 United States, *vs.* May Harris.

53 United States, *vs.* Marie Kenny.

Appeals from the United States District Court for the District of New Jersey.

[December 9, 1940.]

Mr. Justice Murphy delivered the opinion of the Court.

In a proceeding before a grand jury, appellees were asked whether, in 1937, they had made certain statements to government agents concerning earlier conversations with one Ray Born and others regarding the operation of places of ill repute. They denied having made the statements. The grand jury thereupon found the indictments[1] now before us which charge, in effect, that appellees' testimony was false, that it was material to the investigation of the grand jury, and that appellees therefore committed perjury in violation of Section 125 of the Criminal Code (35 Stat. 1111, 18 U. S. C. § 231).[2]

Appellees promptly moved to quash the indictments on the ground that they failed "to charge an offense against the United States". After hearing on the motions, the trial judge entered orders in both cases quashing the indictments because they did not charge an offense under the statute. The cases are here on appeals from these

[1] Although appellees were indicted separately, the indictments in all material respects are identical, and the appeals present the same question. They are therefore treated in one opinion.

[2] Section 125. Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, shall willfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than two thousand dollars and imprisoned not more than five years.

rulings. 18 U. S. C. § 682, 28 U. S. C. § 345; see *United States* v. *Borden*, 308 U. S. 188, 193.

The sole question presented by the two cases is whether the indictments charge an offense under the statute. The indictment against May Harris alleged that " . . . the said May Harris . . . at the times she made the statements aforesaid [before the grand jury], then and there well and fully knew that they were, as a matter of fact, false and untrue in that, and for the reason that, May Harris aforesaid then and there well and fully knew that she did in fact tell and inform the said Special Agents . . . that she had gone to Ray Born in 1932 and talked to him . . . ; that she had spoken to Lou Kissel . . . ; that she had paid money to said James McCullough. . . ."[3]

The trial judge apparently thought that the alleged perjury consisted of contradicting, before the grand jury, the earlier statements made by appellees in conversations with Born and others, for in the opinion accompanying the orders quashing the indictments he stated: " . . . I am satisfied . . . that perjury cannot be predicated upon a contrary statement made by the witness at a time prior to or after the making of the sworn statement, notwithstanding the claim that the witness on her oath denied that she made such statements, which, it is averred, can be proven by two or more credible witnesses." He cited several cases to show that mere proof of prior inconsistent or contradictory statements would not support a charge of perjury. See *Phair* v. *United States*, 60 F. (2d) 953, 954; *Clayton* v. *United States*, 284 Fed. 537, 540.

It is evident, however, that the indictment charged perjury not in the mere making of contradictory and inconsistent statements concerning these conversations, but in swearing falsely before the grand jury that appellees had never told the government agents they had had such conversations. Moreover, proof that appellees had told government agents that they had conversed with Born and others would not be evidence of mere previous inconsistent or contradictory statements by appellees affecting only their credibility as witnesses, but would be direct evidence of the offense itself and hence would support the charge made in the indictment. The difference between the instant cases and such cases as *Phair* v. *United States*,

[3] The charge in the indictment against Marie Kenny, *mutatis mutandis*, is identical with the one quoted.

60 F. (2d) 953, therefore, is obvious and substantial. See *O'Brien* v. *United States,* 99 F. (2d) 368.

Section 125 of the Criminal Code makes no distinction between the false assertions of the fact of prior statements and the false assertions of any other fact. Nor can we see any reason to make one. As the government points out, the denial of the fact that certain statements have been made may be equally as clear, deliberate, and material a falsehood as the denial of any other fact. And since statements made to government agents are generally one of the bases upon which criminal proceedings are instituted and indictments returned, such a distinction might substantially impede effective administration of criminal law.

The facts stated in the indictment are clearly sufficient to charge a violation of the perjury statute. Accordingly, the orders quashing the indictments are reversed and the cause is remanded.

Reversed and remanded.

A true copy.

Test:

Clerk, Supreme Court, U. S.

END